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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 484.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

CHARLES H. MARSHALL, Administrator of the Estate of Josephine B. Marshall, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals (R. 20-24) is not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 30) is in 91 F. (2d) 1010.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 6, 1937 (R. 30). The petition for certiorari was filed October 6, 1937, and granted November 8, 1937.

Questions Presented.

This case arises under the estate tax provisions of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and the Revenue Act of June 6, 1932.

Prior to March 3, 1931, there was no provision in the Federal estate tax laws to the effect that property transferred irrevocably, reserving to the grantor only the income for life, should be included in the value of the grantor's estate for estate tax purposes.

By the Joint Resolution of March 3, 1931, subdivision (c) of Section 302 of the Revenue Act of 1926 was amended by adding a provision including such a transfer.

By the Revenue Act of June 6, 1932, subdivision (c) of Section 302 of the Revenue Act of 1926 was reenacted substantially as so amended by the Joint Resolution of March 3, 1931.

The questions presented are:

(1) Whether the Joint Resolution of March 3, 1931, or the Act of June 6, 1932, should be construed to apply to such a transfer made in 1920; and

(2) If construed to apply to transfers made prior to March 3, 1931, do they violate the due process clause of the Fifth Amendment to the Constitution of the United States?

Statutes and Regulations Involved.

The chronology of these is important.

The pertinent provisions of Section 302 of the Revenue Act of 1926, C. 27, 44 Stat. 9, are as follows:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——

(a) To the extent of the interest therein of the decedent at the time of his death;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(e) [Deals with property held in joint tenancy.]

(f) [Deals with property passing under powers of appointment.]

(g) [Deals with life insurance on decedent's life.]

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution of March 3, 1931 (46 Stat. 1516) is as follows:

"Chap. 454.—Joint Resolution To amend section 302 of the Revenue Act of 1926.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.' (Italics supplied to show the new provision.)

Approved, March 3, 1931."

Then came a Treasury regulation, as follows (T. D. 4314, C. B. X-1, 450):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S. 531 [T. D. 4072, C. B. VI-2, 351]); *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]); *Coolidge* v. *Long* (282 U. S. 582); *Burnet* v. *Northern Trust Co.* (51 S. Ct. 342); *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct. 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct. 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provi-

sions of section 302(h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury."

On April 11, 1932, came a regulation as follows (T. D. 4336, C. B. XI-1, 329):

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

Art. 18. *Retention of possession, enjoyment, or income.—Any transfer which was made by the decedent after 10.30 p. m. Washington, D. C., time, March 3, 1931,* and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or

enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.
OGDEN L. MILLS,
Secretary of the Treasury."
(Italics supplied.)

Following these regulations came the Revenue Act of June 6, 1932, C. 209, 47 Stat. 169, section 803 of which is as follows:

"SEC. 803. FUTURE INTERESTS.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for

his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.'

(b) [This amended 302(f) of the Revenue Act of 1926 relating to powers of appointment.]

(c) [This amended 315(b) of the Revenue Act of 1926 making the transferee, the beneficiary or trustee personally liable.]"

It will be noted that neither the Joint Resolution nor the Act of June 6, 1932, brought up to date or reenacted subdivision (h) of the Revenue Act of 1926 with its provisions for retroactivity.

The regulations of the Treasury Department, above quoted, stood until November 7, 1934, when, in Regulations 80, Article 18 was amended to read as follows:

"Art. 18. Transfers with possession or enjoyment retained.—(a) *Transfers included.*—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after

his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. *The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932.* See section 506 of the Revenue Act of 1934." (Italics supplied.)

On October 26, 1937, the 1937 edition of Regulations 80 was issued, in Article 18 of which there was repeated in the following words the provisions of Article 18 of Regulations 80 issued November 7, 1934, relating to trusts reserving to the trustor the income for life:

"The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932."

Statement.

The facts were stipulated (R. 8-10) before the Board of Tax Appeals.

Josephine B. Marshall died June 4, 1933.

In November, 1920, by a written instrument, she granted, assigned and transferred to her son, Charles H. Marshall, certain securities then owned by her of the value of about $420,000. On its face this was an absolute transfer without any reservation, but on the same day the mother and son signed an agreement (R. 14-15), by the terms of which the son agreed to pay to his mother, during her life, such portion of the income from the securities as she might from time to time request. The son was authorized to sell the securities and reinvest the proceeds and keep the fund in a special account.

We agree with the Government that the two instruments are to be treated as one and have the same effect as a grant to the son with a reservation of the income for life to the grantor.

Prior to the Joint Resolution of March 3, 1931, there had been no provision of the Federal estate tax law taxing irrevocable transfers not in contemplation of death, which reserved only the income for life to the grantor. At the date of Josephine B. Marshall's death, Treasury Regulations were in force to the effect that neither the Joint Resolution of March 3, 1931, nor its reenactment June 6, 1932, applied to transfers of this kind made prior to March 3, 1931, and the estate tax return showing no tax liability was made pursuant to such regulations. Before the tax liability was finally adjusted, the Treasury, on November 7, 1934, reversed its regulations, not as to the Joint Resolution, but as to the Act of June 6, 1932,

and the Commissioner of Internal Revenue, in computing the Federal estate tax, included in the value of her estate the value at the time of her death ($468,115.07) of the funds so held by the son, and as a result determined in January, 1935, that a tax liability existed in the sum of $40,858.34.

The Board of Tax Appeals reversed the Commissioner (R. 20-25) and the United States Circuit Court of Appeals, *per curiam,* affirmed the decision of the Board (R. 30) on the authority of *Welch* v. *Hassett,* 90 F. (2d) 833, C. C. A., First Circuit (now pending here as No. 375, October Term, 1937), and *Bullard* v. *Commissioner,* 90 F. (2d) 144, C. C. A., Seventh Circuit (now pending here as No. 349, October Term, 1937).

Summary of Argument.

I. The Joint Resolution of March 3, 1931, amending Section 302(c) of the 1926 Act, reenacted June 6, 1932, should not be construed to apply to transfers made prior to its passage.

The Resolution contains no provision for retroactive application. The phrase "at any time made" has been held to refer to the period traveling back from date of death to the date of passage of the Act.

Subdivision (h) of Section 302, Revenue Act of 1926, with its provisions for retroactivity, referred only to the trusts then enumerated in (c), and was not reenacted or referred to when the additions to the enumeration in (c) were made in 1931 and 1932.

Four rules of construction are applicable:

(1) Where one section of a statute refers to

another and the other is later amended, the operation of the one is not changed.

(2) A statute should not be construed as retroactive unless clearly and imperatively required by its terms.

(3) A retroactive effect should be avoided, if possible, where otherwise a constitutional question would arise.

(4) Doubt as to the meaning of a statute imposing taxes should be resolved in favor of the taxpayer.

Those in charge of the Resolution in Congress said it was not retroactive.

The Treasury, by Regulation, immediately ruled that the Resolution was not applicable to transfers made before its passage. That Regulation was repeated April 11, 1932.

The Act of June 6, 1932, reenacted the Joint Resolution without material change. The Congress thus accepted the rulings of the Treasury, and affirmed that neither the Resolution nor the Act was intended to be retroactive.

The Treasury Regulations stood unchanged for nearly four years after March 3, 1931, and for more than a year after the decedent's death. The Regulation that the Joint Resolution is not retroactive is still in effect. The change, made November 7, 1934, was that the Act of June 6, 1932, is retroactive though the Joint Resolution was not. This distinction is arbitrary and without basis. If the one was not retroactive, the other was not. The ruling of the Treasury long in effect should be given weight in interpreting the Act.

If the meaning of a statute is obscure the doubt should be resolved in favor of the taxpayer.

II. If construed to apply to trusts made years before its passage, the Joint Resolution, reenacted June 6, 1932, violates the due process clause of the Fifth Amendment.

In a series of decisions this Court has held that an irrevocable grant, reserving only income for the life of the grantor is not testamentary in character and does not take effect on the death of the grantor. It is claimed by the Government that transfers of this type not in contemplation of death, and not truly testamentary, may be classified as testamentary by estate tax laws, because they have some attributes of a testamentary disposition and a tendency to avoid estate taxes.

The question whether they may be so classified prospectively was left open in *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, but the contention that such a classification may be applied retroactively to transfers made years before the passage of the Act treating them as testamentary, has been foreclosed by *Helvering* v. *Helmholz,* 296 U. S. 93, and *White* v. *Poor,* 296 U. S. 98. The income tax cases in which the Court has upheld statutes passed during the tax year or shortly thereafter, and cases involving retroactive taxes under limited conditions, are readily distinguishable.

The Government's argument that in 1920, when this transfer was made, the decedent was forewarned by regulations then in force, but afterward held unauthorized, and by decisions of state courts, that a taxing act might be passed eleven years later, carries the doctrine of notice or forewarning as a justification for

retroactive laws beyond any point indicated by any decision of this Court or even any dissenting opinion.

The case of *Helvering* v. *Helmholz, supra,* is not distinguishable in principle, though dealing with a different section of the statute. It is not distinguishable on the question of forewarning of the taxpayer. In that case the decedent had even more reason to anticipate a statute taxing, as testamentary, transfers containing a provision for termination, wholly defeating the grantee's interest, than the decedent in this case had, to expect a law taxing as testamentary an irrevocable transfer, under which the grantee's remainder could not be defeated.

ARGUMENT.

I.

Neither the Joint Resolution of March 3, 1931, nor the Act of June 6, 1932, should be construed to apply to irrevocable transfers of the kind here involved, made before March 3, 1931.

Prior to March 3, 1931, there had been no provision in the Federal estate tax law taxing as part of a decedent's estate irrevocable grants or trusts not in contemplation of death by which only the income for life was reserved to the trustor. The only provision of the law claimed to have that effect was the one taxing "transfers intended to take effect in possession or enjoyment" at or after the death of the transferor.

In *May* v. *Heiner,* 281 U. S. 238 (decided April 14, 1930) the Court held that the phrase above

quoted did not include a transfer in which the income was withheld from the transferee until the death of the grantor, because such trusts, if irrevocable, were not testamentary in character and were beyond recall by the decedent, and on her death no interest in the property held under the trust passed from her to the living. *May* v. *Heiner* merely reiterated principles announced in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (decided January 2, 1929) and earlier cases. Notwithstanding these decisions the Treasury Department brought up three more cases (*Burnet* v. *Northern Trust Co.; Morsman* v. *Burnet;* and *McCormick* v. *Burnet,* 283 U. S., pages 782, 783 and 784) which, on March 2, 1931, the Court decided in *per curiam* opinions, upon the authority of *May* v. *Heiner.* At the time these three decisions were rendered, only one more day remained of the pending session of Congress.

The Treasury Department immediately drafted an amendment to Section 302(c) of the Revenue Act of 1926, so as to tax trusts of the type in question. This measure, the Joint Resolution of March 3, 1931, was rushed to the Congress and on March 3, 1931, was passed under suspension of the Rules. (See, letter of the Secretary of the Treasury, Congressional Record, Vol. 74, Part 7, 71st Congress, 3rd Session, p. 7198).

The Terms of the Joint Resolution Do Not Require That It Be Given a Retroactive Effect.

The Government asserts that it is plain from its terms that the Joint Resolution was intended to apply to transfers made before its passage, and that there is not room for construction. It contends

(1) that the words "at any time" appearing in the sentence "to the extent of any interest therein of which the decedent has *at any time* made a transfer, by trust or otherwise", in the Joint Resolution, cover trusts previously made; and (2) that in any event subdivision (h) of the Revenue Act of 1926 unequivocally makes the Joint Resolution retroactive.

The first contention has already been rejected by this Court.

The phrase "to the extent of any interest therein of which the decedent has *at any time* made a transfer" first appeared in Section 202(b) of the Revenue Act of 1916, and has appeared in all subsequent revenue acts. It was not amended or changed by the Joint Resolution of March 3, 1931.

In *Shwab* v. *Doyle,* 258 U. S. 529, decided May 1, 1922, the Government made precisely the same contention it is now making as to the effect of the words "at any time", and asserted that they covered periods prior to the date of the enactment of the Taxing Act (see 258 U. S., p. 530). The taxpayer in that case contended that those words covered a period traveling backward from the date of the death of the decedent to the date of the enactment of the law, and with that construction this Court agreed.

Furthermore, the words "at any time" appearing in subdivision (c) of Section 302 of the Revenue Act of 1926 could not have been intended to have the effect claimed by the Government, for otherwise the retroactive provisions of subdivision (h) of that section would have been surplusage. The fact that the Congress enacted subdivision (h) shows that it understood that the phrase "at any time"

in (c) was not broad enough to cover transfers completed before the passage of the taxing statute. See, *Shwab* v. *Doyle, supra,* at page 536; *Lewellyn* v. *Frick,* 268 U. S. 238, at page 252.

There is nothing in the Joint Resolution itself or in the provisions of subdivision (c) as amended by the Joint Resolution to make it retroactive so as to apply to trusts created before its passage.

The only question as to whether the amendment of March 3, 1931, applies to trusts previously made, arises because of subdivision (h) of Section 302 of the Revenue Act of 1926, reading as follows:

> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, *as severally enumerated and described therein,* whether made, created, arising, existing, exercised, or relinquished before or after the enactment of *this Act.*" (Italics ours.)

The question of interpretation is whether this provision for retroactivity applies to transfers *added to that enumeration by later statutes.* It will be noted that in the Joint Resolution amending subdivision (c) the Congress *did not bring up to date or reenact subdivision (h),* or by anything in the Joint Resolution indicate that the provisions for retroactivity in subdivision (h), applicable to subdivision (c) as it stood in 1926, were to apply to transfers not severally enumerated in 302(c) of the 1926 Act, but added on March 3, 1931. Subdivision (h) of the 1926 Act appeared as subdivision (h) in Section 302 of the Revenue Act

of 1924. In the 1926 Act, after making amendments to the various subdivisions of Section 302 of the 1924 Act, Congress reenacted subdivision (h), making it clear that the provisions for retroactivity in (h) were brought up to date so as to apply to the previous subdivisions as amended. If it had followed that course in the Joint Resolution, there would have been no question as to its intent to make subdivision (h) applicable to transfers, of the type here involved, added to the enumeration in (c) by the Joint Resolution.

Obviously, under these conditions, the statute, as amended March 3, 1931, is open to the construction that the provisions of (h) do not apply to the new type of trust then subjected to the tax. The phrase "before or after the enactment of *this Act*" in subdivision (h) of Section 302 of the Revenue Act of 1926, fortifies our position. The underlined words obviously refer to the Act of 1926, making the date of the passage of that Act the dividing line referred to, and certainly the date of the passage of the Act of 1926 cannot appropriately relate to a new object of taxation first taxed on March 3, 1931.

This situation brings into application several rules of statutory construction.

Where One Section of a Statute Refers to Another Section and the Other Is Afterwards Amended, the Operation of the One Is Not Changed.

Occasions for the application of this rule are not common, and there is a conflict of authority. It has been held that where one statute adopts the existing provisions of another statute and the latter is after-

wards amended, the amendments are no part of the adopting statute.

In Lewis' Sutherland on Statutory Construction, 2nd Edition, Vol. II, pp. 787-8, the rule is thus stated:

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. * * * Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

In *Culver* v. *People,* 161 Ill. 89, it was said:

> "The general rule is that an act which adopts, by reference, the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly-implied intent."

See, also, *In re Heath,* 144 U. S. 92, 93; *United States* v. *Mercur Corporation,* 83 F. (2d) 178.

The question here is whether the rule, applicable to the case of two separate statutes, applies to a situation like the present, where one section of a statute refers to another section of the same statute.

In *Calumet Foundry & Machine Co.* v. *Mroz,* 79 Ind. App. 305, the Court, after referring to the rule above stated, said:

> "The same rule would evidently apply where

> one section is made a part of another section of the same act by specific reference, as was done in this case."

See, also, *Crohn* v. *Telephone Co.*, 131 Mo. Appeals 313, 321-2; *Flanders* v. *The Town of Merrimack*, 48 Wis. 567; *Gustafson* v. *Hammond Irrigation District of Rosebud County*, 87 Mont. 217; *State* v. *Beckner*, 197 Iowa 1252; *American Bank* v. *Goss*, 204 App. Div. 759.

The case last cited, applying the rule where two sections of the same statute were involved, was reversed by the Court of Appeals of New York in 236 N. Y. 488. Our search reveals no other cases on that point. The New York Court of Appeals stands alone against the other cases cited. Furthermore, the rule referred to is only a rule of construction, and there come into application here two other rules of construction, (1) that a statute will not be construed as retroactive "unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied"; and (2) that, if possible, a statute will not be construed so as to raise a grave constitutional question. In the case in the New York Court of Appeals, the interpretation adopted did not require that either of these rules be disregarded. There is nothing in the opinion of the New York Court of Appeals to suggest that the rule it followed would be applied so as to override the other more important rules. Even if the rule of statutory construction followed by the New York Court be considered normally preferable to that adopted in *Culver* v. *People*, 161 Ill. 89, and the other cases above cited, it should not be followed in a case like

the present with the result of violating the two more cogent rules that a statute should not be construed as retroactive, or so as to raise constitutional questions.

In the present case, subdivision (h) did not "adopt" subdivision (c) of Section 302 of the Act of 1926. It referred to it and broadened its application, but the principle of the rule above stated is applicable.

A Statute Will Not Be Given a Retrospective Operation Unless that Intention Has Been Manifested by the Most Clear and Unequivocal Expression.

In *United States Fidelity Co.* v. *Struthers Wells Co.,* 209 U. S. 306, this Court said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

United States v. *Heth,* 3 Cranch. 399, 413; *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160, 162; *Reynolds* v. *McArthur,* 2 Peters 417, 434.

This rule has been applied with strictness in the case of gift and estate taxes. *Shwab* v. *Doyle,* 258 U. S. 529; *Nichols* v. *Coolidge,* 274 U. S. 531; *Blod-*

gett v. *Holden*, 275 U. S. 142; *White* v. *Poor*, 296 U. S. 98; *Industrial Trust Co.* v. *United States*, 296 U. S. 220.

In the case last cited the Court had under consideration the operation of subdivision (h) of Section 302 of the 1926 Act. The question was whether the words "transfers, trusts, estates", etc. in subdivision (h) were broad enough to include life insurance taken out by the decedent, and covered by subdivision (g). The question of construction there was not the same as here, but the Court held that it was fairly debatable whether the words above quoted did include life insurance. Surely, the question which we now have, *i. e.*, whether the provision for retroactivity in subdivision (h) of Section 302 of the Revenue Act of 1926 should be carried forward and applied to an additional type of trust first mentioned in the amendment of 1931, is at least as fairly debatable as the question in *Industrial Trust Co.* v. *United States.*

There Is Applicable Here the Rule that a Statute Will Be Construed, If Possible, to Avoid Raising a Grave Constitutional Question.

On this point see *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348-9; *Bingham* v. *United States*, 296 U. S. 211; *Industrial Trust Co.* v. *United States*, 296 U. S. 220, 221; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98. If this statute were construed as retroactive, the Court would be faced with a constitutional question. We think it is not an open one because it has been decided (see pp. 33-53 this Brief), but the petitioner wants the former decisions on the question reconsidered or distinguished. In

either view, the reason for this rule of construction is present.

The extent to which courts go in interpreting statutes to avoid giving them retroactive effect, or raising constitutional questions, is illustrated in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *United States* v. *Goelet,* 232 U. S. 293, 297; *Lewellyn* v. *Frick,* 268 U. S. 238; *Shwab* v. *Doyle,* 258 U. S. 529. See opinion of four Justices in *Blodgett* v. *Holden,* 275 U. S. 142.

The conditions appearing on the face of the statute, considered in the light of the rules of construction we have referred to, require that the Joint Resolution of March 3, 1931, be construed not to apply to transfers previously made, but if there be any doubt about that, it is removed by resort to the Congressional Record, to the rulings of the Treasury Department *and to subsequent action of Congress confirming our interpretation,* none of which can be excluded from the consideration of the Court by the assertion of the petitioner that the amendment made by the Joint Resolution is too plain to give room for construction.

Resort to the Congressional Record, to Treasury Regulations and to Subsequent Action of the Congress, Confirms the View that Neither the Joint Resolution Nor the Act of June 6, 1932 Was Intended to Be Retroactive.

Statements by members of Congress in charge of a bill, as well as reports of committees of House or Senate "may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure." *Duplex Co.* v. *Deering,* 254 U. S. 443, 474.

Mr. Hawley of the Ways and Means Committee of the House was in charge of the Joint Resolution on the floor. We note especially the following:

> "Mr. Sabath: Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?
>
> Mr. Hawley: *It provides that hereafter no such method shall be used to evade the tax*" (Congressional Record, Vol. 74, Part 7, 71st Congress, 3d Session, p. 7198). (Italics ours.)

Mr. Hawley also said:

> "It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, *it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property.* It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. *It is for that purpose* that the joint resolution is proposed" (Congressional Record, Vol. 74, Part 7, 71st Congress, 3d Session, p. 7198). (Italics ours.)

These declarations should be given more than the usual weight because the Joint Resolution was passed in the rush of the closing day of the session under suspension of the rules, *without even having been printed before passage, and in complete reliance on the statements on the floor as to what the Joint Reso-*

lution contained and as to its effect. Similar statements were made on the floor of the Senate (same Congressional Record, p. 6933). The haste with which the Joint Resolution was passed is accounted for by a purpose to reach, as soon as possible, future transfers of this type.

The Government suggests that the statements in Congress that the resolution was not retroactive meant merely that it was not retroactive in the sense of applying to cases of persons who had died prior to the enactment of the Joint Resolution. This is not supported by the Congressional Record, and it is inconceivable that anyone could have believed that such a change in the estate tax law could be made applicable to cases where the trustor had died and the rights of the parties had become fixed before the enactment of the taxing statute. Estate tax laws have uniformly been applied only to estates of persons dying after the passage of the acts.

As we will show hereafter, the action of Congress in reenacting the Joint Resolution on June 6, 1932, after Treasury rulings that the Joint Resolution did not apply to trusts made before its passage, confirms our interpretation of what occurred on the floor of Congress in connection with the Joint Resolution.

On May 22, 1931, shortly after the enactment of the Joint Resolution, the Treasury Department issued a regulation (see p. 5 of this Brief) that the Joint Resolution should not be applied to trusts created before its passage. As the resolution was drafted by the Treasury and passed at its urgent request, it is fair to assume that Congress and the Treasury were in accord as to its meaning, and that the congressmen and senators who made their statements on the floors took their cue from the Treasury, and it

is evident from the Treasury regulation referred to and later ones, that the Treasury understood that the Joint Resolution did not apply to transfers made before its passage.*

The Congress did not deal with the subject again until it passed the Revenue Act of June 6, 1932. Meanwhile, the Treasury had made the regulation of May 22, 1931, and a formal amendment to its regulations (April 11, 1932), to the effect that the Joint Resolution had no application to trusts made before its passage (see p. 6 of this Brief).

So far as estate taxes were concerned, the Revenue Act of 1932 was not a complete statute, but merely amended particular sections of the 1926 Act. Section 803 of the Act of 1932 amended subdivisions (c) and (f) of Section 302 of the Act of 1926. In amending subdivision (c), the Act of 1932 reenacted, without change in substance of any matter material in this case, but with some clarifying provisions, subdivision (c) of the Act of 1926 *as it had been amended by the Joint Resolution.* In the committee reports in both House and Senate, it was said:

> "The purpose of this amendment to section 302(c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer

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* The petitioner suggests that the Treasury regulation of May 22, 1931, is not an interpretation, but a refusal to apply the Joint Resolution restrospectively according to its terms, because it could not constitutionally be thus applied. It would be going a long way for the Treasury to hold a statute invalid, and the better view is that the Treasury meant that subdivision (h) of the 1926 Act should not be construed to apply to the 1931 addition to (c) because to do so would raise a grave constitutional question.

under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect" (House Committee Report No. 708, 72nd Congress, 1st Session; Senate Committee Report No. 665, same session).

As in the case of the Joint Resolution, *the Act of 1932 did not bring up to date or reenact subdivision (h) of Section 302 of the 1926 Act.* If the Joint Resolution did not apply to trusts created before its passage, clearly, as reenacted in Section 803 of the Act of 1932, it did not apply to trusts created before March 3, 1931. The petitioner's brief is vague about this, but does not claim that the Act of 1932 applied to trusts created before the passage of the Joint Resolution, if the Joint Resolution did not.

That there was no basis for distinction in this respect between the Joint Resolution and the Act of June 6, 1932, was recognized by the Treasury until November 7, 1934, because until that date it allowed to stand as applying to cases of persons dying after June 6, 1932, the amendment to Article 18 of the Regulations, first made in May, 1931, and repeated April 11, 1932, to the effect that no such transfer made prior to March 3, 1931, should be taxed.

We thus find that on June 6, 1932, Congress reenacted the provisions of the Joint Resolution after it had been construed as non-retroactive by the Treasury Department. It thus took the Joint Resolution with the regulations tacked to it and accepted the interpretation of the Joint Resolution which the Treasury De-

partment had adopted. *McFeely* v. *Commissioner*, 296 U. S. 102, 108; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 179; *Hartley* v. *Commissioner*, 295 U. S. 216, 220; *Brewster* v. *Gage*, 280 U. S. 320, 327; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466.

By clear implication the regulations were ratified by Congress. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 95.

This not only shows that the reenactment by the Act of 1932 was not intended to apply to trusts created before the passage of the Joint Resolution, but has another repercussion, *i. e.*, that the Congress agreed that the Joint Resolution had not been intended to apply to trusts previously created. It confirms our interpretation of the statements on the floors of Congress when the Joint Resolution was passed.

The regulations of the Treasury to the effect that the Joint Resolution did not cover transfers of the type here involved made before March 3, 1931, were allowed to stand without change, as governing estates of decedents dying after the passage of the Act of June 6, 1932, for three years and eight months after the Joint Resolution was passed. Not until November 7, 1934, did the Treasury Department (evidently searching for revenues to meet the increasing deficits) change its view. By Article 18, Regulations 80, of November 7, 1934 (see p. 8 of this Brief), after referring to the taxability of transfers in trust where the income for life was reserved to the trustor, the Treasury said:

"The provisions of this subdivision do not

apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932."

The hours and dates in this regulation refer respectively to the times of approval of the Joint Resolution and of the Act of June 6, 1932.

This regulation is to the effect that the Joint Resolution did not apply to transfers made before its passage, but that the Act of June 6, 1932, reenacting it, did apply to those made prior to March 3, 1931, provided the grantor died after the passage of the 1932 Act. That regulation was reiterated and reissued as late as October 26, 1937 (see p. 9 of this Brief). Thus it is seen that the Treasury Regulations *still follow the rule that the Joint Resolution did not apply to transfers made before its passage.** They do provide that by virtue of the Act of June 6, 1932, such transfers made since the enactment of the first estate tax law of 1916 are taxable under the estate tax law, provided the grantor lived until after June 6, 1932. There is no basis for making this distinction between the Joint Resolution and the Act of June 6, 1932. It is not authorized by Section 506 of the Revenue Act of 1934. *In its brief the petitioner does not contend for such a distinction or suggest any reason for it.* The two enactments did not differ substantially, and neither reenacted subdivision (h) of Section 302 of the 1926 Act. If the

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* The Treasury stood by this in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, where it did not even argue that the Joint Resolution applied to a trust created before its passage, where the decedent died May 20, 1931. See footnote, page 10, petitioner's brief in No. 375, *Hassett* v. *Welch*.

one did not apply to transfers made before March 3, 1931, the other did not.*

The interpretation given by the Treasury to the Joint Resolution from the time of its passage to the present day, and the interpretation given to the Act of June 6, 1932, for more than two years after its passage, *and adhered to for one and one-half years after the death of Josephine B. Marshall,* cannot be overlooked. Doubtless, estates of some persons dying after March 3, 1931, whether before or after June 6, 1932, have been closed and taxes settled, without being held for taxes, such as are claimed here. It would be grossly unfair to discriminate against this and other estates where the settlement has been deferred.

This Court has repeatedly announced the rule that where there is room for difference of opinion as to the meaning of a statute, the interpretation of the officers of the law charged with its application and enforcement are given great weight, and one of the reasons for the rule is the hardship and injustice

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* How little faith the Treasury has had in its attempt to distinguish between the Joint Resolution and the Act of June 6, 1932, is shown by *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248, decided October 28, 1936, two years after the change in the Regulations made November 7, 1934. That case involved an irrevocable trust reserving income for life of the grantor, made in January 1928, the grantor having died August 3, 1933. It was squarely within the amended Regulation of November 7, 1934. The Board said:

> "Respondent (the Commissioner of Internal Revenue) in his brief does not contend that * * * section 803(a) of the Revenue Act of 1932, is applicable."

After discussing the law, the Board added:

> "* * * we think the respondent is correct in making no contention that the amendment to section 302(c) of the Revenue Act of 1926 contained in section 803(a) of the Revenue Act of 1932 has any effect in the present proceeding."

of retroactive changes. *United States* v. *Alabama Great Southern R. Co.*, 142 U. S. 615, 621; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Logan* v. *Davis*, 233 U. S. 613, 627; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *United States* v. *Moore*, 95 U. S. 760, 763.

Manhattan Co. v. *Commissioner*, 297 U. S. 129, is not against us. There the Treasury overturned an earlier regulation. The Court held that the one overturned was unreasonable and contrary to the law. Here the regulations that the Joint Resolution does not apply to trusts made before its passage *have never been changed and are still in force*, and the regulation of November 7, 1934, attempting to differentiate between the Joint Resolution and the Act of June 6, 1932, and, in dealing with trusts made prior to March 3, 1931, to discriminate between decedents who died between the enactment of the Joint Resolution and the Act of 1932, and those who died after June 6, 1932, is so arbitrary and unsupported by anything in the statutes that it must be ignored by the Court under the reasoning of the case last cited, and as the Treasury has heretofore ignored it (see footnote, p. 30 of this Brief).

Reversals of rulings of this kind which have stood for long periods cause confusion and work discrimination and injustice.* The reasons against such action have grown in recent times when so much

* An illustration is found in the common practice of testators of providing in wills for payment of estate and inheritance taxes out of some specified fund. See paragraph Fourth, Will of Clara Smith, p. 48 of Record in Bullard Case No. 349. The reversal of rulings after a testator's death, so as to impose unexpected tax liabilities, often upsets the testator's legacies. See *The Farmers' Loan and Trust Co.* v. *Winthrop*, 238 N. Y. 488, where the court relieved the situation by construing the will to refer only to inheritance taxes.

of government is in the form of administrative law and regulations.

Every decision by the lower courts or the Board of Tax Appeals since March 3, 1931, has declined (regardless of the date of the decedent's death) to treat the Joint Resolution or the Act of 1932 as applicable to trusts created before the Resolution was passed. *Welch* v. *Hassett,* 90 F. (2d) 833 (C. C. A. 1st); *Smith* v. *United States,* 16 F. Supp. 397; *United States* v. *Nichols,* 92 F. (2d) 704 (C. C. A. 1st); *Myers* v. *Magruder,* 15 F. Supp. 488 (Dist. of Maryland); *Pierce* v. *Clauson,* 21 F. Supp. 259; *Helvering* v. *Marshall,* 91 F. (2d) 1010; *Collins* v. *Berryman* (E. D. Virginia, Nov. 29, 1937, C. C. H. Federal Tax Service 1938, §9035); *Foster* v. *Commissioner,* 26 B. T. A. 708, 716; *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248; *Cooper* v. *Commissioner,* 34 B. T. A. 1315; *Whiting* v. *Commissioner,* 35 B. T. A. 100; *Schneider* v. *Commissioner,* 35 B. T. A. 183; *Dahl* v. *Commissioner,* 35 B. T. A. 282; *Pearson* v. *Commissioner,* 36 B. T. A. 5; *Security-First National Bank* v. *Comm.,* 36 B. T. A. 633; *First National Bank* v. *Comm.,* 36 B. T. A. 491.

In *Welch* v. *Hassett, supra,* the Court said:

> "* * * it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before."

If Doubt Exists as to the Construction of a Taxing Statute It Should Be Resolved In Favor of the Taxpayer.

Gould v. *Gould,* 245 U. S. 151; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; *White* v. *Aronson,* 302 U. S. 16.

It is a rare case where there is such an overwhelming accumulation of reasons and rules of construction as are found here in support of the respondent's position. We think the case can be disposed of on this point, but pass on to consider the constitutional question.

II.

If the joint resolution of March 3, 1931, and its reenactment June 6, 1932, are construed to apply to transfers of the kind here involved, made before March 3, 1931, they are, as so applied, in violation of the Fifth Amendment.

The decisions of this Court on this point are clear.

The Federal estate tax is an excise tax upon the transfer of property upon the death of the owner, and is measured by the value at death of the interest transferred by death. *Knowlton* v. *Moore,* 178 U. S. 41, 49; *Edwards* v. *Slocum,* 264 U. S. 61, 62; *Nichols* v. *Coolidge,* 274 U. S. 531, 541; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; *May* v. *Heiner,* 281 U. S. 238, 244.

No decision of this Court has ever upheld a Federal estate or gift tax imposed on an unalterable transfer, not in contemplation of death, made prior to the passage of the taxing statute. Lack of unanimity among the Justices is found only where the transfer was made during the year in which the act was passed, or made to beat a pending bill.

The rule against retroactivity has been applied not only to cases where the transfer was made prior to the passage of any estate tax law, but to cases where transfers were made while an estate tax law was in effect, and the particular type of transfer was covered for the first time by an amendment to the taxing act, passed after the transfer was made.

In *Nichols* v. *Coolidge,* 274 U. S. 531, the decedent in 1907 transferred real and personal property in trust, reserving to herself the right to the income, which right was relinquished in 1917. Also, in 1917, the decedent transferred to her children certain real property, reserving the right to use and enjoy it during her life. The question was whether the value of the property transferred should be included in the gross estate as transfers "intended to take effect in possession or enjoyment at or after death". The Court said:

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power (p. 540) * * *.
>
> Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them (p. 541) * * *
>
> Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.
>
> Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall.

Property of small value transferred before death may have become immensely valuable, and the estate tax swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2d) 625.

This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450. See also *Knowlton* v. *Moore*, 178 U. S. 41, 77. And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider" (pp. 542-3).

In *Blodgett* v. *Holden*, 275 U. S. 142 (see 276 U. S. 594) the question was whether the gift tax act of June 2, 1924, taxing all gifts made during the calendar year 1924 and thereafter, could be constitutionally applied to gifts made in January 1924, the bill for the act having been introduced in February, 1924. With

eight Justices sitting, an opinion, in which four concurred, held the act as applied to such gifts invalid, citing *Nichols* v. *Coolidge, supra.* Four Justices agreed that the clause "during the calendar year 1924" should be construed to apply only to that part of the year subsequent to the passage of the act.

In *Untermyer* v. *Anderson,* 276 U. S. 440, the facts were like those in *Blodgett* v. *Holden,* except that it appeared that the gifts were made May 23, 1924, nine days before the gift tax act was passed, but three months after the bill had been introduced, and after the Conference Report on the bill had been made and was pending. With a full bench the Court construed the Act to apply to gifts made any time in 1924 and held it invalid as applied to gifts made before its passage. We quote from a dissenting opinion because on other parts of it, the Government has attempted to build its argument:

> "The Act with which we are here concerned had, however, a special justification for retroactive features. The gift tax was imposed largely to prevent evasion of the estate tax by gifts *inter vivos,* and evasion of the income tax by the splitting up of fortunes and the consequent diminution of surtaxes. If, as is thought by the Court, Congress intended the gift tax to apply to all gifts during the calendar year, its purpose may well have been to prevent evasion of the gift tax itself, by the making of gifts after its introduction and prior to its passage. Is Congress powerless to prevent such evasion by the vigilant and ingenious? This Court has often recognized that a measure may be valid as a necessary adjunct to a matter that lies within legislative power, even though, standing alone, its constitu-

tionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264, 289; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560. If the legislature may prohibit the sale of confessedly innocent articles in order to insure the effective prohibition of others, I see no reason why it may not spread a tax over a period in advance of its enactment sufficiently long to insure that the tax will not be evaded by anticipating the passage of the act. Compare *United States* v. *Doremus,* 249 U. S. 86, 94. In taxation, as well as in other matters, 'the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured.' See Mr. Justice Holmes, in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 241. Under the rule now applied, even a measure framed to prevent evasion of a tax from a date when it is practically certain that the act will become law, is deemed unreasonable and arbitrary.

The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of making customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means" (pp. 450-1).

In *May* v. *Heiner,* 281 U. S. 238, the decedent, on October 1, 1917, had made an irrevocable trust reserving the income for life to her husband, and in case of his death to herself. The Court, stating that it was

unimportant whether the decedent survived her husband, held that the transfer was not one to take effect in possession or enjoyment at or after death within the meaning of the statute, and said:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.
>
> The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event (p. 243)."

In *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, the decedent had made, in February 1917, an irrevocable trust, reserving to herself the income for life. She died in 1923, and the question was whether the trust was one "to take effect in possession or enjoyment at or after death" within the meaning of that phrase, contained in the 1916 Revenue Act and repeated in the Revenue Act of 1921. The opinion, *per curiam*, after stating that the statute had already been construed by the Court, said:

> "* * * in this view, there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved, the judgment of the Circuit Court of Appeals for the

Seventh Circuit is affirmed upon the authority of *May* v. *Heiner*, 281 U. S. 238."

The reservation of the question as to validity of *prospective* legislation carries the inference that the question of the validity of retroactive legislation was not open.

In *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, the decedent had made a trust, giving the income to his daughter for life, with remainder to others. The indenture contained a provision that the trustee could terminate the trust in his discretion, and another that if the daughter predeceased the grantor the trust should terminate, and in either case the trust estate would revert to the grantor. Neither of these contingencies had taken place. The grant was beyond the power of the grantor to revoke or alter. The question was whether the transfer was one "intended to take effect in possession or enjoyment at or after death" within the meaning of the Revenue Act of 1924. The Court said:

"'The event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of his estate either by will or the law relating to intestacy. When, therefore, § 302 (c) includes within the purview of § 301 (a) a transfer *inter vivos* 'intended to take effect in possession or enjoyment at or after his death,' it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy.

'But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v.

McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The "generating source" of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare *Tyler* v. *United States,* 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other *in consequence of the death which happens afterward.*' (Ital. added.) *Heiner* v. *Donnan,* 285 U. S. 312, 322-323 (pp. 41-2). * * *

After the execution of the trust he held no right in the trust estate which in any sense was the subject of testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility" (p. 43).

See, also, *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, and *Bingham* v. *United States*, 296 U. S. 211.

In *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, the Court dealt with that part of Section 302(d) of the Revenue Act of 1926 (*supra*, p. 3) taxing transfers in trust which were subject at the date of his death to any change through the exercise of a power by the decedent, in conjunction with any person, to alter, amend or revoke. The trust was made in 1930, *after the passage of the statute.** Referring to *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court said:

> "It was held that a gift beyond the power of the grantor to alter, amend or revoke could not be said to take effect in possession or enjoyment at or after his death. Conversely, one which he alone held the power to revoke or modify came within the section, since, at his death, substantial interests passed from his control and were for the first time confirmed in others. The case involved nothing more than a determination whether the transfers were complete when made. If they were the statute did not reach them (p. 88). * * *
>
> The section was first introduced into the Revenue Act of 1924, and reenacted in that of 1926. Mrs. James created her trust in 1930. She was, therefore, upon notice of the law's command, and there can be no claim that the statute is retroactive in its application to her transfer.
>
> The inquiry is whether it is arbitrary and unreasonable *to prescribe for the future* that, as

* In that case the trust deed reserved to the grantor the income for life. It was made in 1930, and she died May 22, 1931, after the passage of the Joint Resolution of March 3, 1931. The precise question in the case at bar was there presented, but the Government did not raise it.

> respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exercisable jointly with another (pp. 89-90) * * *.
>
> It was appropriate for Congress to prescribe that if, *subsequently to the passage of that Act,* the creator of a trust estate saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor" (p. 92). (Italics ours.)

In contrast with the *City Bank Farmers Trust Company* case is *Helvering* v. *Helmholz,* 296 U. S. 93. In 1918, *when there had been in force since 1916* an estate tax law taxing transfers "to take effect in possession or enjoyment at or after death," the decedent had transferred property in trust, reserving to herself the income for life. She died in 1927. The indenture provided that the trust might be terminated by the trustees, of whom the grantor was one, or by action of the board of directors of a named corporation, or on its dissolution, and if terminated during her life, the trust estate would revert to her. The questions decided were whether the provision of Section 302(d) of the Revenue Act of 1926, first appearing in the Revenue Act of 1924, taxing trusts containing a power to the grantor in conjunction with other persons, to revoke, alter or amend, should be construed to apply, and if so, whether, as applied to a trust made in 1918, it was valid. Although the Court was dealing with subdivision (d), the principle is applicable to subdivision (c). The Court held that it ought not to

be so construed, but if retroactive it would be invalid. It said:

> "Another and more serious objection to the application of § 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If § 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531" (pp. 97-8).

Though the Court was divided on the question of interpretation, it was unanimous on the point that applied to a transfer made before its passage, the statute was invalid.

White v. *Poor*, 296 U. S. 98, is similar, the trust having been made December 31, 1919, and the grantor having died in January 1931, and the Court said:

> "What has been said in the *Helmholz* case requires a ruling that the section, if held to apply to this transfer, offends the due process clause of the Fifth Amendment" (p. 102).

The principle established by the two cases last cited is that where a transfer is within the *penumbra* which lies between dispositions which are certainly testamentary and those which certainly are not, the power to classify by placing in the class of testa-

mentary dispositions those which the law has previously left untaxed, may not be exercised in respect of transfers previously made.

The only difference between those two cases and this is that a transfer of the sort here involved has less of the attributes of a testamentary disposition than the type considered in the *Helmholz* and *Poor* cases. Here it is an open question whether the transfer is even in the *penumbra*. There the transfer was of a sort which in *Helvering* v. *City Bank Farmers Trust Co., supra,* the Court held was in the twilight zone and could validly be taxed *prospectively* as a testamentary transfer.

In *Myers* v. *Magruder,* 15 Fed. Supp. 488, a case involving an irrevocable grant, reserving income for life, made in 1925, the grantor dying February 1, 1934, it was said:

> "But whatever doubt may have heretofore existed as to the validity of the retrospective taxing legislation here involved is completely dispelled by *Helvering* v. *Helmholz,* 296 U. S. 93, 56 S. Ct. 68, 80 L. Ed. 76, and *White* v. *Poor,* 296 U. S. 98, 56 S. Ct. 66, 80 L. Ed. 80, especially when read in connection with *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, 56 S. Ct. 74, 80 L. Ed. 29, 100 A. L. R. 1239; *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35, and *Helvering* v. *City Bank Farmers Trust Co., Trustee,* 296 U. S. 85, 56 S. Ct. 70, 80 L. Ed. 62, all decided on the same day, November 11, 1935" (p. 494).

The petitioner contends that a retroactive tax is not always in violation of the Fifth Amendment, but only if it is arbitrary, and that it is not so if at the time

of a transfer, the grantor was on notice or forewarned, that a statute might later be passed to include it, and cites cases sustaining retroactive taxes.

Income tax laws, in which the income for a year is the base, have been applied retroactively to income for the entire calendar year in which the law was passed, and income tax laws passed early in one year have been applied to the preceding calendar year. Cases of that type are, *Stockdale* v. *Insurance Companies,* 20 Wall. 323; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1; *Lynch* v. *Hornby,* 247 U. S. 339, 343.

Cooper v. *United States,* 280 U. S. 409, on which the petitioner so much relies, is of the same type. The Revenue Act of 1921 was enacted November 23, 1921, imposing taxes on income for the entire calendar year 1921. It provided that the basis for computing gains on sales of property acquired by gift should be cost to the donor. The taxpayer received a gift on November 1, 1921, and sold the property November 7th, only two weeks before the act was approved. It is obvious that if Congress may tax income for the calendar year in which the taxing act is passed, it can and must at the same time prescribe the basis for computing income.

Hecht v. *Malley,* 265 U. S. 144, involved a corporation excise tax, based on a year's income. The tax was for the year ending June 30, 1919, imposed under the Revenue Act of 1918, the passage of which was delayed until February 24, 1919.

In *Reinecke* v. *Smith,* 289 U. S. 172, an income tax case, the Court said:

"Nor do we think the act has such a retroactive

effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440, and *Blodgett* v. *Holden,* 275 U. S. 142. In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction. In the present case the subject of the tax is not the creation of the trusts or the transfer of the *corpus* from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States,* 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379" (p. 175).

Third National Bank & Trust Co. v. *White,* 287 U. S. 577, dealt with a tenancy by the entirety, a peculiar estate, and is irrelevant. Cases such as *United States* v. *Heinszen & Co.,* 206 U. S. 370, are also distinguishable. Ours is not a case where taxes were imposed under laws clearly imposing them but afterwards held invalid. Duties on imposts into the Philippines had been imposed and collected by the Military Government and under later enactments by the Philippine Commission. It later developed that those authorities were wanting in power to enact the laws, and the Court sustained an Act of Congress ratifying their action in imposing the duties. On the other hand, in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, the Court held invalid a Florida statute ratifying unauthorized collection of canal tolls. Mr. Justice Holmes said:

"It is true that the doctrine of ratification has been carried somewhat beyond the point that we

indicate, in regard to acts done in the name of the Government by those who assume to represent it. *Tiaco* v. *Forbes,* 228 U. S. 549, 556. It is true also that when rights are asserted on the ground of some slight technical defect or contrary to some strongly prevailing view of justice, Courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions, some of which are collected in *Danforth* v. *Groton Water Co.,* 178 Mass. 472, 477. *Dunbar* v. *Boston & Providence R. R. Co.,* 181 Mass. 383, 385. In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine.

But Courts can not go very far against the literal meaning and plain intent of a constitutional text" (pp. 339-340).

See,

Graham & Foster v. *Goodcell,* 282 U. S. 409, 429.

In *Milliken* v. *United States,* 283 U. S. 15, the decedent, in December 1916, made a gift *in contemplation of death,* which was taxable on her death under the estate tax provisions of the Revenue Act in force when the gift was made. The Revenue Act passed in 1919 increased the rates, and the donor survived until March 5, 1920. The Court held that "a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time" was not arbitrary. As a gift in contemplation of death, like a gift *causa mortis,* is essentially a testamentary disposition, the situation was much the same as if she had made a will in 1916 and the rates had been changed before she died.

In *Porter* v. *Commissioner,* 288 U. S. 436, the trustor reserved to himself alone, the power to change

the beneficiaries and make any disposition he chose, of the income and *corpus* of the estate except for his own use. The transfer, during the life of the trustor, was completely ambulatory.

Other cases cited by petitioner are still farther afield.

The petitioner's argument that the taxpayer, in 1920, was forewarned of a statute passed eleven years later, seems to be built around the dissenting opinion in *Untermyer* v. *Anderson,* and the cases there cited, but the question there was whether a gift tax law enacted June 2, 1924, applying to all gifts during 1924, could validly be applied to a gift made only nine days before the act was passed, and after the bill had reached the stage where a conference report was awaiting action.

There is nothing in that opinion or in any other which even squints at stretching the doctrine of a forewarning of future enactments so as to apply it to an irrevocable transfer untaxed when made and completed beyond recall eleven years before a statute was passed to tax it. A Treasury ruling erroneously construing existing law gives no assurance that the Congress will change the law even prospectively to read as the Treasury thought it to be, *and still less gives any warning that the future legislation will be retroactive.*

The petitioner asserts (p. 29 Petitioner's Brief in No. 375) on the point that the decedent had reason to expect the enactment of the taxing statute, that *Helvering* v. *Helmholz, and White* v. *Poor, supra,* are to be "sharply distinguished" from this case. In the *Helmholz* case the trust was made in 1918. In *White*

v. *Poor,* the trust was made December 31, 1919. The provision relied on here to put the decedent on guard (the one covering transfers to take effect in possession or enjoyment at death) had been in force since 1916. So far as the face of that statute is concerned, was there not as much reason to anticipate a statute taxing a trust containing a provision for divesting the named beneficiaries by a termination of the trust, as to expect a statute to tax trusts reserving income for life? The first type of trust is more nearly a transfer to take effect at death than is the second.*

The petitioner depends largely, as a warning to the decedent, on former Treasury Regulations holding taxable as transfers to take effect on death, those reserving income for life, and yet no such Regulation was issued until August 14, 1919, Article 24, Regulations 37. Is a distinction to be made between those who made such trusts between 1916 and August 14, 1919,** and those who made them afterwards?

As far back as *Levy* v. *Wardell,* 258 U. S. 542, 544, decided May 1, 1922 (and earlier in the lower courts) doubt was being raised whether an irrevocable grant, reserving income for life, was a transfer to take effect on death. Certainly there was handwriting on the wall in *Nichols* v. *Coolidge, Reinecke* v. *Northern Trust Co.;* and *May* v. *Heiner.* Such transfers made in the light of those decisions, may well have been regarded by the grantors as free from tax under

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* Under the 1921 Revenue Act the Treasury claimed that a power to terminate, in conjunction with others, labeled a trust as one to take effect on death. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; see also Art. 24, Regulations 37, issued August 14, 1919; Art. 25, Regulations 37, issued January 31, 1921; Art. 21, Estate Tax Regulations, issued July 27, 1922.

** Such a case is *Whiting* v. *Commissioner,* 35 B. T. A. 100, now pending in C. C. A. 9th Circuit.

existing laws, as indeed they were. In the administration of the Acts of March 3, 1931, and 1932, hopeless confusion would follow an attempt to draw a distinction between trusts made before those decisions, and trusts made afterwards. The matter of notice or forewarning, relied on by the Government, would be governed by the situation and state of the decisions at the time each trust was made, and the case of each decedent would turn on its peculiar facts and circumstances.

In substance, the position of petitioner is that although the former Treasury Regulations, beginning August 14, 1919, were wrong, the taxpayer should have considered them right, and that the decision of this Court in *Burnet* v. *Northern Trust Co.* was so unwarranted, that the taxpayer should never have thought it possible. Why, after *Nichols* v. *Coolidge, Reinecke* v. *Northern Trust Co.*, and *May* v. *Heiner, supra,* anyone should have been surprised by the decision May 2, 1931, in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, it is hard to see.

In its brief in No. 375 (pp. 32-3) citing *Commissioner* v. *Chase National Bank,* 82 F. (2d) 157, the Government contends that where a decedent lived beyond the date of the Joint Resolution and Act of June 6, 1932, this retroactive tax is not arbitrary because he had notice of their provisions, and a chance to prevent the imposition of the tax by relinquishing his life estate. The same argument applies here, as Josephine B. Marshall survived until June 4, 1933, *but the petitioner overlooks the fact that from May 22, 1931, until long after she died the Regulations of the Treasury prescribed that the Joint Resolution and Act of 1932 were not applicable to her*

trust. Why should she make an attempt to rid her estate of a tax liability when existing Treasury Regulations assured her there would be none, and lulled her into security? The Government's argument merely confirms ours as to the injustice of overturning Regulations on which taxpayers have relied.

Furthermore, if, after March 3, 1931, Mrs. Marshall, then over seventy years of age and with death near, had relinquished her life estate, merely to avoid the tax, is there any doubt the Government would now be contending (with the two-year statutory presumption to support it) that her act was in contemplation of death and the surrender of her life estate failed of its purpose?

A transfer *inter vivos,* irrevocable, not made *causa mortis,* or in contemplation of death, and reserving only the income for life, is a vested gift when made, and without doubt could be then taxed as such. It is only because it is claimed that such a transfer has some attribute of a testamentary disposition, or a tendency to avoid estate taxes, that the right is claimed under the so-called *penumbra* doctrine, to classify it with true testamentary dispositions, under estate tax laws. See, *Milliken* v. *United States,* 283 U. S. 15, 20. There is much in the decisions of this Court running counter to the view that such transfers may be classified as testamentary and taxed *prospectively.* The Circuit Court of Appeals so held in *Bullard* v. *Commissioner,* 90 F. (2d) 144 (No. 349 this Term).

If treated as gifts, it is settled that such transfers cannot validly be taxed as such by a gift tax law

passed years after they are completed. May they be taxed retroactively by merely exercising the doubtful power to transfer them from one class to the other? *Heiner* v. *Donnan,* 285 U. S. 312, 331. Classification prospectively may be reasonable. Classification retrospectively may be, and in this case is, arbitrary and void. The distinction between such retroactive and prospective classifications was clearly drawn in *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, 90, 92.

It is arbitrary to tax retroactively the whole value of the property, including the remainder, when only the life estate is affected by the grantor's death. Certainly the remainder is not an interest which passes on death. *Knox* v. *McElligott,* 258 U. S. 546; *Griswold* v. *Helvering,* 290 U. S. 56.

The power to classify is strained to the verge, if not beyond it, by treating as testamentary, even prospectively, transfers such as are here involved. Laying aside cases where transfers are made to beat pending bills, the conclusion must be that *Helvering* v. *Helmholz,* and *White* v. *Poor, supra,* definitely settle the principle that a statute making such a classification cannot be applied to transfers made long before its passage, and that the mere possibility, not realized for years, that some day the Congress might enact such a measure, is not enough to take a case from under the rule. The only open question is the one reserved in *Burnet* v. *Northern Trust Co., supra.,* viz., whether such trusts may be prospectively classified as testamentary.

This Court has quoted with approval (*Shwab* v. *Doyle, supra*) Judge Story's statement that:

> "retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither

accord with sound legislation nor with the fundamental principles of the social compact."

Estate and gift taxation are fields in which the Federal Government has but recently entered. If proper estate tax laws, supplemented by proper gift tax laws, remain in effect for a time, the problems here presented would soon disappear. Because that situation has not existed, there is a temptation to reach back by retroactive laws and to tax transfers, completed long before. To gain a few millions in revenue, a mere drop in the bucket of annual expenditures, the salutary rule against retroactive legislation would be permanently undermined. Mr. Justice Holmes said in *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 340:

> "To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot."

The judgment should be affirmed.

Respectfully submitted,

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GEORGE H. CRAVEN,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

Nos. 375, 484.—October Term, 1937.

Thomas B. Hassett, Individually and as Former Acting Collector, Petitioner, 375 *vs.* E. Sohier Welch, et al., Executors.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 484 *vs.* Charles H. Marshall, Administrator of the Estate of Josephine B. Marshall, deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners ask us to hold that Section 302 (c) of the Revenue Act of 1926[1] as amended by the Joint Resolution of Congress of March 3, 1931,[2] and Section 803 (a) of the Revenue Act of 1932,[3] includes in the gross estate of a decedent, for estate tax, property which, before the adoption of the amendments, was irrevocably transferred with reservation of a life estate to the transferor; and that, so applied, the statute does not offend the due process clause of the Fifth Amendment of the Constitution. The numerous cases pending in the courts and the Board of Tax Appeals involving these questions, and the claim that decisions of this court have not settled the matter, moved us to grant certiorari.

The respondents in No. 375 are executors under the will of a decedent who died November 20, 1932. On February 13, 1924, voluntarily and without valuable consideration, he transferred to a trustee property which he expected to receive under the will of his brother, reserving to himself the income for life, directing division of the income after his death between nephews and nieces and dis-

[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411 (c).
[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).
[3] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

tribution of the corpus, upon the death of the survivor of them, amongst their then living issue. After his brother's death, and on October 22, 1926, he duly ratified and confirmed the original trust instrument. The Commissioner ruled that the value of the trust assets should be included in the decedent's gross estate, in the view that the transfer was testamentary, because made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926. The respondents paid the resulting tax and sued for refund in the District Court of Massachusetts. Judgment went for the Collector.[4] The Circuit Court of Appeals held that the District Court erred in concluding that the transfer was made in contemplation of death or was intended to take effect in possession or enjoyment after death. The petitioner nevertheless insisted upon the legality of the exaction as the decedent died after the 1931 and 1932 amendments of Section 302 (c), which declared the property transferred a part of the gross estate for computation of estate tax, in virtue of the reservation to the transferor of the income for his life. The court overruled the contention, holding that, if so retroactively enforced, the legislation violated the Fifth Amendment of the Constitution, and reversed the judgment.[5] In his application for certiorari the petitioner did not assign error to the Circuit Court's ruling as to the nontestamentary character of the transfer but confined his attack to the decision that the amendments of Section 302 (c) could not constitutionally be invoked to sustain the tax.

In No. 484 it appears that the decedent died intestate June 4, 1933. The respondent, her son, is her administrator. November 15, 1920, she transferred to him certain cash and securities. On the same day they entered into an agreement reciting an understanding that, in case of his death during her life, the securities and cash should be reconveyed to her and, in the meantime, he should pay her such portions of the income therefrom as she might from time to time request in writing; that while he held the securities he might invest and reinvest; that he should bequeath her all the assets constituting the fund, in case she survived him; that she would reimburse him for any increased income taxes payable by

[4] 15 F. Supp. 692.
[5] 90 F. (2d) 833.

him in virtue of his ownership of the fund and that, if she should survive him and take the property under his will, she would reimburse his estate for state and federal inheritance taxes due by reason of the bequest. The agreement contained other provisions for the safeguarding and separate custody of the fund during the mother's life. The respondent paid the decedent portions of the income upon her request. He executed a will bequeathing the property to her on the terms mentioned in the agreement, but upon her death, he revoked the bequest. The Commissioner included the value of the fund in the decedent's gross estate, holding that she had made a transfer within the terms of Section 302 (c) of the Revenue Act of 1926, as amended in 1931 and 1932. The Board of Tax Appeals reversed the Commissioner's determination and the Court of Appeals affirmed its action[6] upon the authority of the decision of the Circuit Court of Appeals of the First Circuit in No. 375 and that of the Seventh Circuit in No. 349, decided this day.

Counsel for the Government argue that the Joint Resolution of 1931 and Section 803 (a) of the Revenue Act of 1932 were intended to impose an estate tax measured by transfers of the sort therein described which had been irrevocably made prior to the passage of the legislation and that, so construed, they are not arbitrarily or unreasonably retroactive and do not offend the due process clause of the Fifth Amendment. Counsel for respondents answer that the enactments were intended to operate only upon transfers subsequently consummated and, if construed to reach the past transfers here involved, violate the amendment. We hold that the statutes are prospective in their operation and do not impose a tax in respect of past irrevocable transfers with reservation of a life interest.

Ascertainment of the intended application of the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, involves a reading of them in the light of cases construing similar phraseolgy of earlier acts, their legislative history and administrative interpretation. There is agreement that Section 803 (a) reenacted the substance of the Joint Resolution with but slight verbal differences. It will, therefore, be necessary to quote

[6] 91 F. (2d) 1010.

only the Resolution. By it Section 302 (c) of the Revenue Act of 1926, *supra*, was amended to provide:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —"

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death* (1) *the possession or enjoyment of, or the income from, the property or* (2) *the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

The matter in ordinary type is Section 302 (c) as it was prior to amendment; the additions are in italics.

The Government relies on the words "at any time" as demonstrating that the legislation was intended to apply to transfers made before its adoption and is so unequivocal as to leave no room for construction. This phrase, appearing in an earlier revenue act, had, however, been held not to render the statute effective upon transfers antedating the passage of the Act[7] and Congress apparently realized that the expression did not carry the statute back so as to embrace transactions consummated before its passage; for, in subsection (h) of Section 302 of the Act of 1926,[8] in referring to transactions and interests giving rise to a tax by virtue of preceding subsections, it directed that they should be taxable "whether made, created, arising, existing, exercised, or relinquished before or after the enactment *of this Act.*"[9] We conclude that the meaning of the section is not so free from doubt as to preclude inquiry concerning the legislative purpose.

The history of the Resolution is of material aid in its construction. Section 302 (c) of the Act of 1926, like earlier acts, measured the tax by the inclusion in the gross estate of property of which the decedent had made a voluntary transfer in contemplation of,

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[7] Shwab *v.* Doyle, 258 U. S. 529; Union Trust Co. *v.* Wardell, 258 U. S. 537; construing Sec. 202 of the Act of Sept. 8, 1916, 39 Stat. 777.

[8] 44 Stat. 71, U. S. C. Tit. 26, Sec. 411 (h).

[9] Compare Shwab *v.* Doyle, supra, at p. 536; Lewellyn *v.* Frick, 268 U. S. 238, 252.

or intended to take effect in possession or enjoyment at or after his death. Notwithstanding the Treasury had ruled that a transfer of assets with a reservation of income for the donor's life came within the definition this court held otherwise.[10] Dissatisfied with the decision, the Government sought a reversal of it but, in three judgments, announced on March 2, 1931, the ruling was reaffirmed.[11] In the opinions in these cases, which led to the preparation and adoption of the Resolution, the court said there was "no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved . . ." There then remained one day of the current session of Congress. The Treasury drafted an amendment of Section 302 (c) to bring trusts of this type within its sweep, in the form of the Joint Resolution of March 3, 1931, which was sent to Congress on the day of our decisions and was passed, under a suspension of the rules, on the next day, the last of the session.[12]

Because its passage was considered exigent the Resolution was adopted without having been printed and in reliance on statements made from the floor. The Congressional Record discloses the understanding of the Congress with respect to its scope. Mr. Garner, of the House Ways and Means Committee, stated: "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it."[13]

Mr. Hawley, of the same Committee, in charge of the Resolution, stated, in answer to a question: "It provides that hereafter no such method shall be used to evade the tax" and, referring to the situation created by the decisions of this court, he said:

"It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts

[10] May v. Heiner, 281 U. S. 238, construing § 402 (c) of the Revenue Act of 1918, 44 Stat. 1057, 1097.

[11] Burnet v. Northern Trust Co., 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783; McCormick v. Burnet, 283 U. S. 784, construing § 402 (c) of the Revenue Act of 1921 and § 302 (c) of the Revenue Act of 1924.

[12] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, p. 7198.

[13] Cong. Rec., 71st Cong., 3rd Sess., Vol. 74, Part 7, pp. 7198-7199.

or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

This language, we think, scarcely bears the interpretation put upon it by Government counsel,—that the tax was meant to be laid on estates of all who died after the adoption of the Resolution.

Bearing in mind that the Resolution was prepared and its passage recommended by the Treasury, the administrative interpretation supports in uncommon measure the view that it was not intended to operate upon transfers completed prior to its passage. Promptly upon its passage the Department issued T. D. 4314,[14] approved by the Secretary of the Treasury May 22, 1931, which was in the form of a letter to collectors of internal revenue and others concerned. It quoted the language of the resolution and stated:

"In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge*, (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner*, (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, jr.* v. *Burnet*, (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court." (Italics in the original.)

April 11, 1932, Regulations 70 were amended by T. D. 4336 and, in part, read:

"Art. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 p. m., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth."

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[14] C. B. X-1, 450.

Not only is the legislative history of Section 803 (a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought.[15] Moreover, the reenactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reenacted.[16]

Regulations 80, approved November 7, 1934, after paraphrasing section 803 (a), concluded: "The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932 [The date of passage of the Revenue Act of 1932]. See section 506 of the Revenue Act of 1934." This regulation was retained as Article 18 in the 1937 edition of Regulations 80 issued October 26, 1937. Thus while the regulations have been altered to treat Section 803 (a) of the 1932 Act as retroactively affecting transfers made after March 3, 1931, the Department has consistently ruled that the Resolution of 1931 has no application to transfers made prior to its adoption. The position thus recently taken is inconsistent in its treatment of the two like enactments and is difficult to understand in view of the consistent interpretation of the Joint Resolution but it fails to weaken the force of that consistent interpretation with knowledge of which Congress reenacted the same provision in 1932.

The Government urges that all of these circumstances which are persuasive that the enactments were intended to operate for the future are overborne by Section 302 (h) of the Revenue Act of 1926, which is:

"Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the

[15] The reports of the Committees of both House and Senate contain this statement: "The purpose of this amendment to section 302 (c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect" (House Committee Report No. 708, 72nd Cong., 1st Sess.; Senate Committee Report No. 665, same session).

[16] Brewster *v.* Gage, 280 U. S. 327, 337; United States *v.* Dakota-Montana Oil Co., 288 U. S. 459, 466; McFeely *v.* Commissioner, 296 U. S. 102, 108; United States *v.* Safety Car Heating Co., 297 U. S. 88, 95.

transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, *as severally enumerated and described therein*, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of *this* Act." (Italics supplied.)

It will be remembered that the Joint Resolution of 1931 amended Section 302 (c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that Act. Since Section 302 (c) in its original form was, by Section 302 (h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.

Resort is had to canons of constructions as an aid in ascertaining the intent of the legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case. The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A well-settled canon tends to support the position of respondents: "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."[17] The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.[18]

In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;[19] that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved

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[17] Lewis' Sutherland on Statutory Construction, 2d Ed., Vol. II, pp. 787-8.

[18] Calumet Foundry & Machine Co. v. Mroz, 79 Ind. App. 305; State v. Beckner, 197 Iowa 1252; Crohn v. Telephone Co., 131 Mo. App. 313; Gustafson v. Hammond Irrigation Dist., 87 Mont. 217; Flanders v. Merrimack, 48 Wis. 567; *contra*, American Bank v. Goss, 236 N. Y. 488.

[19] United States v. Heth, 3 Cranch 399, 413; Reynolds v. McArthur, 2 Pet. 417, 434; Shwab v. Doyle, 258 U. S. 529; United States v. Magnolia Petroleum Co., 276 U. S. 160, 162.

in favor of the taxpayer,[20] we feel bound to hold that the Joint Resolution of 1931 and Section 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively.

Holding this view, we need not consider the contention that the statutes as applied to the transfers under consideration deprive the respondents of their property without due process in violation of the Fifth Amendment.

The judgments are

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[20] Gould *v.* Gould, 245 U. S. 151; Shwab *v.* Doyle, *supra;* Reinecke *v.* Northern Trust Co., 278 U. S. 339, 348; White *v.* Aronson, 302 U. S. 16.